

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SEVENTH REGION**

OHIO CEILING & PARTITION, INC.¹

Employer

and

Case 7-RC-22483

**LOCAL 67, OPERATIVE PLASTERERS' AND CEMENT
MASONS' INTERNATIONAL ASSOCIATION OF THE
UNITED STATES AND CANADA, AFL-CIO**

Petitioner

and

**LOCAL 9, INTERNATIONAL UNION OF BRICKLAYERS
AND ALLIED CRAFTWORKERS, AFL-CIO**

Intervenor²

and

**LOCAL 886, OPERATIVE PLASTERERS' AND CEMENT
MASONS' INTERNATIONAL ASSOCIATION OF THE
UNITED STATES AND CANADA, AFL-CIO**

Party in Interest³

¹ The Employer's name appears as amended at hearing.

² Both the Petitioner and the Employer challenge the Intervenor's standing to intervene. Intervenor's motion to intervene is based on its agreement with the Employer to be bound by the terms of its contract with Michigan Council of Employers of Bricklayers and Allied Craftworkers, which applies to plasterers. The term of that contract is from June 22, 1997 through June 21, 2000, with a provision allowing the contract to roll over absent notice by either party. There is insufficient evidence to conclude that either party gave notice terminating their contractual relationship. I find that the agreement with the Employer demonstrates Intervenor's interest in this proceeding, and the hearing officer properly granted the motion to intervene. Casehandling Manual, Part Two, Representation Proceedings, § 11022.1(d).

³ At hearing, the Employer entered into evidence its contract between the Toledo Area Carpenter Employers Association, Inc., of which the Employer is a member, and the Party in Interest, effective by its terms from July 1, 2000 through June 30, 2004, covering the plastering industry. By letter dated June 16, 2003, the Party in Interest waived interest in participating at the hearing. It did not, however, disclaim interest in representing the employees in the unit sought by the Petitioner. Because the Party in Interest has an effective contract covering all or some of the employees sought in the instant petition and has not

APPEARANCES:

Gregory T. Lodge, Attorney, of Toledo, Ohio, for the Employer.

Eric Frankie, Attorney, of Detroit, Michigan, for the Petitioner.

John Adam, Attorney, of Southfield, Michigan, for the Intervenor.

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding,⁴ the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.
3. The labor organizations involved claim to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Sections 2(6) and (7) of the Act.

The Petitioner is currently recognized as the bargaining representative of a unit of approximately 10 to 15 full-time and regular part-time plasterers employed by the Employer working at or out of its facility located at 1740 Commerce Road, Holland, Ohio, in certain areas of Michigan; but excluding all other employees, and guards and supervisors as defined in the Act. It desires certification under the Act. The Intervenor argues that an election is barred by Petitioner's Section 9(a) contract with Architectural Contractors Trade Association (ACT), as the Employer

disclaimed interest in representing those employees, I find that the Party in Interest must be a party to this case. Casehandling Manual, Part Two, Representation Proceedings, § 11120. In addition, no party contends the Employer's contract with the Party in Interest is a bar to the instant petition, and I find it is not a bar.

⁴ The Employer, Petitioner, and Intervenor filed briefs, which were carefully considered.

has agreed with the Petitioner to be bound by its terms. In addition, the Intervenor contends that the contract bars an election because the unit in which the Petitioner seeks an election is not co-extensive with its existing unit. The Employer argues that the unit sought by the Petitioner is too broad, and should be limited to the territory as set forth in Petitioner's contract with ACT.

For the reasons set forth below, I find there is no contract bar to the instant petition because the Petitioner is the recognized bargaining agent of the employees covered by the contract and may petition for certification during the term of its own contract. In addition, I find that the fact the Petitioner is seeking to represent a larger unit than it currently represents does not preclude Petitioner from seeking certification, and that an election in the unit as forth in the petition is appropriate.

The Employer is engaged in the building and construction industry performing plastering work within at least the states of Michigan and Ohio. On April 14, 1997, the Employer signed an agreement with the Petitioner agreeing to be bound by Petitioner's contract with ACT, a multi-employer association formed for purposes of collective bargaining, formerly known as the Detroit Association of Wall and Ceiling Contractors.⁵ The contract between ACT and the Petitioner in effect at the time was a Section 8(f) agreement, with a provision allowing the contract to roll over absent notice by either party. Subsequently, ACT and the Petitioner entered into a Section 9(a) agreement effective by its terms from August 1, 2000 through May 31, 2003. That agreement initially covered work performed in certain areas in Michigan, including Wayne, Oakland, Lapeer, Macomb, and St. Clair counties. At the end of November 2000, ACT and the Petitioner signed an "Agreement to Amend Collective Bargaining Agreement" which expanded the territorial coverage of the 2000-2003 agreement to additionally include the counties of Washtenaw and Sanilac, and portions of Livingston County.⁶

The Intervenor contends that the Petitioner's contract with ACT serves as a bar to the instant petition. At the time the Employer executed an agreement to be bound by the contract between ACT and the Petitioner, the contract in effect was a Section 8(f) agreement.⁷ The Petitioner and ACT later entered into a Section 9(a)

⁵ In *Architectural Contractors Trade Association*, Case 7-CA-22466, issued contemporaneously with this decision, in which the Petitioner sought an election in a multi-employer unit, the undersigned found that despite the employers' membership in ACT, their respective units remained separate.

⁶ In *Gem Management Company, Inc.*, 339 NLRB No. 71 (2003), which involved the 2000-2003 agreement between ACT and the Petitioner, the Board found that this amendment did not bind non-members of the association who adopted the contract.

⁷ Sec. 8(f) of the Act reads as follows:

"It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) because

agreement. There is no evidence, however, that the bargaining relationship between the Employer and the Petitioner likewise converted to a Section 9(a) relationship. To establish voluntary recognition in the construction industry pursuant to Section 9(a), the Board requires evidence (1) that the union unequivocally demanded recognition as the employees' Section 9(a) representative, and (2) that the employer unequivocally accepted it as such. *H.Y. Floors & Gameline Painting*, 331 NLRB 304 (2000). The Board also requires a contemporaneous showing of majority support by the union at the time Section 9(a) recognition is granted. *Golden West Electric*, 307 NLRB 1494, 1495 (1992). As to this contemporaneous showing, the Board has held that an employer's acknowledgment of such support is sufficient to preclude a challenge to majority status by an employer. *H.Y. Floors & Gameline Painting*, supra; *Oklahoma Installation Co.*, 325 NLRB 741 (1998).

The record is devoid of evidence that any of these conditions took place with regard to the bargaining relationship between the Petitioner and the Employer. The Employer's agreement to be bound as a non-member of ACT predates the 2000-2003 contract between ACT and the Petitioner, which acknowledged their Section 9(a) relationship. Thus, while the Petitioner's relationship with ACT converted to a Section 9(a) relationship, the Petitioner's relationship with the Employer remained governed by Section 8(f). Compare *Verkler, Inc.*, 337 NLRB No. 18 (2001); *Reichenbach Ceiling & Partition Co.*, 337 NLRB No. 17 (2001). An 8(f) contract will not serve as a bar to a petition filed at any time pursuant to Section 9(c). *John Deklewa & Sons*, 282 NLRB 1372 (1987), enfd. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir 1988), cert. denied 488 U.S. 889 (1988).

Moreover, even if the Petitioner and Employer have a Section 9(a) relationship, it is well established that an employer's recognition of, and current contract with, a petitioning union does not bar a petition for certification by that union. *Duke Power*, 173 NLRB 240 (1969). A recognized bargaining agent is entitled to the benefits of certification. *Id.*; *General Box Co.*, 82 NLRB 678 (1949). Although Intervenor argues that the timing of the filing of the instant

(1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: Provided, That nothing in this subsection shall set aside the final proviso to section 8(a)(3) of this Act: Provided further, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9(c) or 9(e)."

petition—three days before the ACT collective bargaining agreement was to expire—should preclude the Petitioner from seeking the benefits of certification, the Board will entertain a petition filed by a voluntarily recognized union desiring certification at any time during the contract term. *Id.* There are no time constraints in that situation comparable to the insulated period under the contract bar doctrine.⁸

In addition, the Intervenor argues that the unit in which the Petitioner seeks an election goes beyond the existing geographical unit and, because it is not co-extensive with its existing unit, this should preclude the Petitioner from relying on *General Box*. In other words, the Petitioner is seeking an election in a unit comprised of employees covered by Petitioner's contract and some employees who are not covered and, thus, the Intervenor argues, the ACT contract should bar the election. A contract, however, cannot bar an election as to employees to which the contract does not apply. *Duke Power*, supra at 240-241. Accordingly, I find that the Petitioner's contract with ACT is not a bar to the instant petition.

The Employer argues that the unit sought by the Petitioner is too broad, and should be limited to the territorial limitations as set forth in Petitioner's contract with ACT. The Board, however, does not normally define the scope of a bargaining unit in geographic terms, or upon the scope of a local union's territorial jurisdiction. *John Sundvall & Co.*, 149 NLRB 1022, 1023 (1964). The record establishes that the Employer's employees currently represented by the Petitioner and the Party in Interest periodically work outside of their respective union's territorial jurisdictions. Thus, the evidence adduced at hearing provides insufficient basis for perpetuating a geographic division of plasterers into separate units. *Building Construction Employer Ass'n*, 147 NLRB 222, 224 (1964).

The Employer additionally contends that the proper unit in this case should be the ACT multi-employer unit. However, the undersigned found in Architectural Contractors Trade Association, Case 7-RC-22466, issued contemporaneously with this decision, in which the Petitioner sought an election in that multi-employer unit, the individual employer's respective units remained separate, despite the fact ACT acted as their bargaining agent. Thus, the petition was dismissed. Further, the Employer is not a member of ACT and would not be part of that unit. Accordingly, I find that the petitioned-for unit is appropriate.

5. Based on the foregoing, and the record as a whole, I find that the

⁸ The parties to a contract which is approaching its expiration date are provided with a 60-day "insulated period" immediately preceding and including the expiration date to negotiate and execute a new contract. The insulated period does not apply where, as here, the contract is not a bar for other reasons under Board rules. *National Brassiere Products Corp.*, 122 NLRB 965 (1959); *Stewart-Warner Corp.*, 123 NLRB 447 (1959).

following employees constitute an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time plasterers employed by the Employer working at or out of its facility located at 1740 Commerce Road, Holland, Ohio; but excluding all other employees, and guards and supervisors as defined in the Act.

Those eligible to vote shall vote as set forth in the attached Direction of Election.⁹

Dated at Detroit, Michigan, this 9th day of July 2003.

(SEAL)

/s/ Stephen M. Glasser
Stephen M. Glasser, Regional Director
National Labor Relations Board-Region 7
Patrick V. McNamara Federal Building
477 Michigan Avenue –Room 300
Detroit, Michigan 48226

Classifications

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440 8375 5033 0000

⁹ The parties stipulated that the construction industry eligibility formula set forth in *Daniel Construction Co.*, 133 NLRB 264 (1961), is applicable to this case, and I find that formula to be appropriate.